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92-1360

No. _____

Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

THOMAS J. DILLON,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

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40 pp

QUESTION PRESENTED FOR REVIEW

In interpreting the "speedy trial" provision of the Interstate Compact on Detainers, did the Tennessee Supreme Court err and exceed its authority when it held that the petitioner, a federal prisoner, was unable to stand trial?

LIST OF ALL PARTIES TO THE PROCEEDINGS

The following is a list of all parties to the proceeding in the Tennessee Supreme Court, whose judgment is sought to be reviewed in this case:

The State of Tennessee

Thomas J. Dillon.

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OPINIONS BELOW

The order of the trial court in State of Tennessee v. Thomas J. Dillon, No. 37597, granting the petitioner's motion to dismiss the indictment is unpublished, and is reproduced in the Appendix at a-1a. The opinion of the Court of Criminal Appeals, State of Tennessee v. Thomas J. Dillon, No. 03C01-9103-CR0091, is unpublished, and is reproduced in the Appendix at 2a-20a. The opinion of the Tennessee Supreme Court has been submitted for publication, although it has not yet been published. It is reproduced in the Appendix at 21a-41a, and also may be found through WESTLAW at 1992 WL 387566.

SUPREME COURT JURISDICTION

The judgment of the Supreme Court for the State of Tennessee was filed on November 16, 1992. This Petition for Writ of Certiorari is filed pursuant to 28 U.S.C. Section 1257(a).

STATUTES CONSTRUED

T.C.A. § 40-31-101:

ARTICLE IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with article V (a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated; provided, that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request. Provided, further, that there shall be a period of thirty (30) days after receipt by the appropriate authorities before the request be honored, within which period the

governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good and honor time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. These authorities in the sending state simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them

of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceedings made possible by this article, trial shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indict-

ment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V (e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

***

ARTICLE VI

(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of such time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

STATEMENT OF THE CASE

The petitioner, Thomas Dillon, was charged with first degree murder and felony murder by means of a presentment issued by the Knox County Grand Jury on June 21, 1989, said murder allegedly occurring in June of 1987. (Appendix, 22a). At the time of the presentment, the petitioner was committed to the Bureau of Prisons for incarceration, due to his March 19, 1988, conviction of conspiracy to distribute cocaine in the United States District Court for the Southern District of Ohio, and his January 31, 1989, plea of guilty to knowingly possessing a silencer entered in the United States District for the Middle District of Florida. (Appendix, 23a). The petitioner was committed to the Bureau of Prisons for incarceration where he remained until he was brought to the State of Tennessee pursuant to the Interstate Agreement on

Detainers on December 11, 1990. (Appendix, 22a). Upon being brought to the State of Tennessee pursuant to the Interstate Agreement on Detainers from federal custody in Jesup, Georgia, a trial date was set for February 11, 1991. (Appendix, 23a).

The State filed its notice to seek the death penalty on January 10, 1991. Suppression motions filed by the defendant came on for hearing before the Honorable Judge Ray L. Jenkins on February 8, 1991 and February 11, 1991. An evidentiary hearing was not held, but the Court heard arguments of counsel for the petitioner and the State. After the close of arguments, the trial court ordered the evidence suppressed; said evidence having been seized pursuant to an unconstitutional search of the defendant's safe deposit box. (Appendix, 23a).

On February 11, 1991, the original trial date, the State orally moved for a

continuance, said continuance being granted. The petitioner's case was reset until April 1, 1991. (Appendix, 23a).

On March 5, 1991, the trial court issued an order pursuant to Rule 9(b), Tennessee Rules of Appellate Procedure, granting the State an appeal by permission so that the State could contest the trial court's ruling on the defendant's suppression motions. (Appendix, 23a). On the same date of March 5, 1991, Assistant Attorney General Bob Jolley, asked counsel for the petitioner, Douglas Trant, to step into the Judge's chambers for a moment. (Appendix, 24a). A brief discussion was had at which time Judge Ray L. Jenkins stated that he was inclined to grant a stay based on the interlocutory appeal by the State. Counsel for the petitioner stated that one of his positions of objection would be that the petitioner would have to remain in the Knox County Jail where his treatment

had been deplorable. General Jolley said that he would talk to the State about the possibility of a transfer back to the federal authorities and let counsel for the petitioner know the next day. The discussion was brief, lasting only a few minutes, and took place in its entirety in the Judge's chambers. At the time this discussion took place in the Judge's chambers, the State of Tennessee had filed no motion to continue or to stay the proceedings. (Appendix, 29a). The case was not docketed for any hearing on March 5, 1991, and there was no court reporter present. (Appendix, 31a). The Court did not indicate that by participating in the discussion that it was entertaining a hearing on the issue of a stay. The petitioner had no knowledge of any hearing being set, nor did his counsel. (Appendix, 29a). Regardless, on March 6, 1991, the Court ex parte signed an order staying the trial court pro-

ceedings pending the resolution of the State's appeal. (Appendix, 24a). Neither the petitioner nor counsel were present when the order was signed.

As a result of the above proceedings and ex parte order, the petitioner filed a motion to dismiss the indictment on April 22, 1991, 130 days after the defendant was brought to Tennessee. (Appendix, 24a). A hearing was held on this motion. Counsel for the petitioner argued that the Interstate Agreement on Detainers had been violated because no continuance had been granted for good cause shown in open court with the defendant or his counsel present and that the time limitations under Article IV had not been tolled under Article VI.

At the hearing on the motion to dismiss the indictment, the State never took the position that a continuance had been granted in open court from the trial date of April 1,

1991. The only continuance the State referred to was the continuance granted in open court from February 11, 1991 to April 1, 1991. The State never argued that it filed either a motion for a stay, or a motion for a continuance pending the interlocutory appeal by the State. In fact, the State never mentioned the in-chambers discussion referring to a potential stay. Most importantly, the State never argued that the petitioner or the State was unable to stand trial pursuant to Article VI of the Interstate Agreement on Detainers.

The trial court took the matter under advisement, and on May 17, 1991, entered an order dismissing the indictment because of the failure of the State to cause the trial to be commenced within 120 days of the arrival of the prisoner in the receiving state. The Court found as follows:

1. The Stay Order was not entered for good cause in open Court in compliance with Interstate Compact on Detainers.

2. The Order failed to toll the running of the 120-day period.

(Appendix, 1a).

There was no finding in the Order, nor was there any proof presented at any time that the petitioner was unable to stand trial. (Appendix, 1a). At all times, the petitioner stated he was ready for trial and strenuously objected to any and all motions for continuance.

On April 4, 1991, the Court of Criminal Appeals for the state of Tennessee granted the State's application for interlocutory appeal to appeal the trial court's ruling on the suppression motions. (Appendix, 6a). On October 10, 1991, having consolidated the state's appeal from the suppression hearing, and its subsequent appeal from the dismissal

of the presentment, the Court of Criminal Appeals reversed the decision of the trial judge in its opinion and order, and reinstated the indictment against the petitioner. (Appendix, 10a).

The petitioner filed an application for permission to appeal to the Supreme Court of Tennessee, said application being granted. The opinion of the Supreme Court for the State of Tennessee was issued on November 16, 1992. (Appendix, 21a).

SUMMARY OF ARGUMENT

The Tennessee Supreme Court erred in holding that the petitioner was unable to stand trial pending the state's appeal of adverse trial rulings. The Tennessee Supreme Court did not have the authority to reach the conclusion that the defendant was unable to stand trial as the Interstate Act on Detainers requires the court having jurisdiction of the matter- the trial court- to make the determination as to whether the defendant is unable to stand trial in open court for good cause shown. The trial court did not have the opportunity to continue or stay the proceedings as the State did not file either a motion for continuance or a motion for a stay.

ARGUMENT

The Interstate Agreement on Detainers is a congressionally sanctioned interstate compact within the context of the Compact Clause of the United States Constitution. The Compact Clause of the United States Constitution provides a pertinent part,

> "No state shall, without the consent of the Congress, . . enter into any agreement or Compact with another state..."

U. S. Constitution, Article I, Section 10, Clause 3.

"In the case of the Detainer Agreement, Congress gave its council in advance by enacting the Crime Control Consent Act of 1934, [4 U.S.C. Section 112 (1985)]." See generally, Cuyler v. Adams, 449 U.S. 433, 442 and n.9, 101 S.Ct. 703, 708 and n.9,, 66 L.Ed. 644 (1981). The Agreement is, therefore, considered a "law []. . of the United

States." See Carchman v. Nashville, 473 U.S. 716, 719-720, 105 S.Ct. 3401, 3403, 87 L.Ed. 516 (1985).

As the Interstate Agreement on Detainers is a federal statute, any prisoner, including the defendant, transferred under its provisions is entitled to the protection of federal law. Cuyler v. Adams, 449 U.S. 433, 66 L.Ed.2d 641, 101 S.Ct. 703 (1981). Clearly, therefore, the petitioner is entitled to the full protection of federal law under the Interstate Agreement on Detainers and Article I, Section 10, Clause 3 of the United States Constitution.

The Congress of the United States in adopting the Interstate Agreement on Detainers considered carefully the purpose behind the detainer. In an effort to prevent abuse of the use of detainers, Congress, in adopting the Interstate Agreement on Detainers, considered the following House and

Senate report:

> The Attorney General has advised the Committee that a prisoner who has a detainer lodged against him is seriously disadvantaged by such action. He is in custody and therefore in no position to seek witnesses or preserve his defense. He must often be kept in close custody and is ineligible for desirable work assignment. What is more, when detainers are filed against a prisoner he sometimes loses interest in institutional opportunities because he must serve his sentence without knowing what additional sentences may lie before him, or when, if ever, he will be in the position to employ the education and skills he may be developing. H.R. Rep. No. 91-1018, p. 3 (1970); S. Rep. No. 91-1356, p.3 (1970).

In United States v. Mauro 436 U.S. 340, 56 L.Ed.2d 329, 98 S.Ct. 1834 (1978), the United States Supreme Court held that a prisoner transferred under the Interstate

Agreement on Detainers was entitled to be tried within 120 days of his arrival in the receiving state. If the trial is not held and is not continued upon a showing of good cause in open court, the indictment must be dismissed.

When faced with the issue of whether or not the trial court was correct in dismissing the indictment of the petitioner because of the state' failure to commence the trial within 120 days of the defendant being received into custody in the state of Tennessee, the Tennessee Supreme Court was required to interpret several provisions of the Interstate Agreement on Detainers, T.C.A. §§40-31-101 to 108. As the Tennessee Supreme Court recognized, pursuant to the intent of Congress, the Agreement establishes uniform procedures whereby a state may resolve its charges against another jurisdiction's prisoner. Because detainers adversely affect

programs of prisoner treatment and rehabilitation, the Agreement's purpose is to provide cooperative state procedures for the expeditious and orderly disposition of the charges underlying such detainers. To this end, the Agreement provides that when a prisoner is called to answer charges in another jurisdiction,

> trial shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Indeed, the Tennessee Supreme Court itself has recognized that if a prisoner is not brought to trial within the specified time period, the charges against him must be dismissed with prejudice, and specifically noted

that because of its remedial nature, the Agreement is to be liberally construed in favor of the prisoners it was intended to benefit. Nelms v. State, 562 S.W.2d 923 (Tenn. 1976.) In Nelms, the dismissal of an indictment was upheld where a defendant was not brought to trial within 180 days of his demand to be tried under a detainer placed by the State of Tennessee because the attorney general had made no motion for a continuance under the Interstate Agreement on Detainers. T.C.A. 40-31-101 et seq. and 18 U.S.C. App. III. The Nelms court held that dismissal of the indictment was necessary "as essential to produce general compliance with the statutory mandate." 532 S.W.2d 923, 927.

In interpreting the Agreement on Detainers, the Tennessee Supreme Court recognized that:

> the Compact provides for the tolling of the 120-day period in two

> situations, the first being by "any necessary or reasonable continuance" granted "for good cause shown in open court," and the second being that the "running of [the Compact's speedy trial] periods shall be tolled whenever and for long as the prisoner is unable to stand trial."

However, despite these two tolling provisions, the Tennessee Supreme Court failed to note that Article VI states that:

> (a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of such time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, **as determined by the court having jurisdiction of the matter.**

The trial court never determined that the petitioner was unable to stand trial. No motion for a continuance or stay was ever made in open court for good cause. Simply stated, the Tennessee Supreme Court effectively ducked the issue at hand and thwarted the purpose of the Agreement. As the court

in Stroble v. Anderson, 587 F.2d 830, 838 (6th Cir. 1978), noted, "We believe that Art. VI was written as a protective measure for a transferred prisoner. It cannot appropriately be turned from a shield for the defendant into a sword for the prosecution." The Tennessee Supreme Court has parried what was intended by Congress to be a shield for the defendant into a powerful sword which it has unconstitutionally wielded in favor of the state.

Although the Tennessee Supreme Court may be correct in its determination that a prisoner is unable to stand trial during "periods of delay occasioned by the defendant," in direct contradiction to the Agreement, the trial court never made this determination. Instead, the Tennessee Supreme Court in an attempt to rectify the trial court's mistake made the determination that the defendant was unable to stand trial. If

it is indeed true that the time from the filing of the defendant's motion to suppress until the conclusion of the appellate process is directly attributable to that motion and is time the defendant is unable to stand trial, the Agreement demands and requires that the **trial court** make that decision. Further, the Agreement demands and requires that the determination be made for good cause shown in open court. In the instant case, no motion for continuance or stay was ever made, and the trial court did not have the opportunity to determine whether or not the time from the filing of the defendant's motion to suppress until the conclusion of the appellate process was directly attributable to that motion and consequently was time the defendant was unable to stand trial. As there was no argument presented by the State and consequently, no finding by the trial court that the State could not proceed to

trial without the suppressed evidence, the Tennessee Supreme Court's finding that the defendant was unable to stand trial is not supported by the record. Thus, in holding that the petitioner is not entitled to a speedy trial within the provisions of the Interstate Agreement on Detainers, the Tennessee Supreme Court effectively held that in order to possess and use one constitutional right- i.e. the Interstate Agreement on Detainers, the petitioner must effectively waive the right to file pre-trial motions.

It is clear in this case from the record that no hearing was held in open court with the petitioner or his counsel present. The trial court correctly held, therefore, that no such motion for a continuance for good cause was held in open court with the petitioner or his counsel present. He then dismissed the indictment with prejudice and ordered the petitioner returned to federal

custody. A dismissal with prejudice was, and still is, the only remedy available under the Interstate Agreement on Detainers.

There is absolutely no provision under the Interstate Agreement on Detainers for a stay issued by the Court of Criminal Appeals pending this matter on appeal, and no justifiable reason for the stay found in the record. The record is absolutely clear that the State was not granted a continuance past 120 days for good cause shown in open court with the petitioner or his counsel present, nor was there a determination made by the trial court in open court with the defendant or his counsel present that the defendant was unable to stand trial. In fact, a stay negates the purpose of the Interstate Agreement on Detainers in making sure that the prosecutors strictly adhere to the provisions of the Statute and, if they do not, prisoners are immediately returned to their institution so

that their rehabilitation can continue.

The holding of the Tennessee Supreme Court is most definitely in conflict with other courts of last resort, and courts of federal jurisdiction. The landmark case on the issue on point in this cause is Stroble v. Anderson, 587 F.2d 830 (6th Cir. 1978). The Stroble court held that any continuance beyond the 120 day time limitation under Article IV of the Interstate Agreement on Detainers must be granted for good cause shown in open court, and specifically held that the "term 'open court' meant with a judge on the bench." Stroble, 587 F.2d 830, 839. As in the instant case, the record in Stroble did not disclose any determination by the state court that the defendant was "unable" to stand trial as the defendant was in the jurisdiction at the time of the scheduled trial and was not physically or mentally handicapped. Stroble, 587 F.2d 830, 838.

The defendant in this cause has been present in the jurisdiction of the trial court at all times since being brought to Tennessee on December 11, 1991, and is not, nor has he ever been, physically or mentally handicapped. As stated above, the record in this case presents no testimony from any witness by the State of Tennessee that the defendant was unable to stand trial, and there is no holding by the Court that the defendant was unable to stand trial.

The Court of Appeals for the Sixth Circuit in U.S. v. Eaddy, 595 F.2d 341 (6th Cir. 1979), held that the provisions of the Interstate Agreement on Detainers may be waived, but only where there is an affirmative request to be treated in a manner contrary to the procedure prescribed by such article. Eaddy, 595 F.2d 341, 344. The Court upheld the dismissal of the indictment in Eaddy and held that the appellant did not waive his

rights under Art. VI(e) by failing to state a preference as to the place of his incarceration while awaiting trial on the federal bank robbery charge. Eaddy, 595 F.2d 341, 343. The Court went on to hold that:

> Article IV and the sanctions contained therein are presented in mandatory terms. Article IV(c) provides: 'trial (shall) commence within 120 days of the arrival of the prisoner in the receiving state...' The use of mandatory term 'shall' in connection with the above provisions demonstrates that the States which are parties to the Agreement have the affirmative duty of complying to its terms.
>
> Eaddy, 595 F.2d 341, 343.

In the Eaddy case, the prisoner was transferred back to state custody before final determination was made of his case. The Court held that the burden of compliance was on the State, and no waiver was completed in Eaddy.

The Second Circuit in U.S. v. Ford, 550 F.2d 732 (2nd Cir. 1977), held that any continuance granted under Art. IV must be for good cause in open court with the defendant or his counsel being present. The Ford court noted that one of the major problems in the record was that there were continuances granted sua sponte without any type of formal hearing. Ford, 550 F.2d 732, 743. As in the Ford case, the record in this case indicates that there was a continuance granted, although there was no formal hearing, no motion for a continuance or stay filed by the State, and no hearing docketed nor any notice given to the defendant or his counsel. Likewise, in Johnson v. Stagner, 781 F.2d 758 (1986), the Ninth Circuit upheld the dismissal of an indictment because they could not tell whether or not the continuance was granted following a proceeding in open court, or if so, whether the defendant Johnson or his

counsel attended the proceeding. As the Johnson court so aptly noted, statutory requirements cannot be ignored.

In Haigler v. United States, 531 A.2d 1236, (D.C.App. 1987), the District of Columbia Court of Appeals held that a defendant must be tried within 120 days unless good cause for continuance is demonstrated in open court. The Haigler court quoted the United States Supreme Court in Mauro as follows:

> We do not accept the Government's narrow reading of this provision; rather we view Article IV(c) as requiring commencement of trial within 120 days whenever the receiving State initiates the disposition of charges underlying a detainer if previously lodged against a state prisoner. Any other reading of this section would allow the Government to gain the advantages of lodging a detainer against a prisoner without assuming the responsibilities that the Agreement intended to arise from such an action.

Haigler, 531 A.2d 1236, 1241.

Haigler emphasized the fact that the burden is on the Government to assure that a defendant is tried under the time limitations of Art. IV of the Interstate Agreement on Detainers unless a motion for continuance is made and granted for good cause shown in open court with the defendant or his counsel present, and specifically noted that a tolling under Art. VI could not be had where the defendant files a pre-trial motion to suppress evidence. The court stated that:

> It offends basic principles of criminal justice to suggest that a defendant must forego one constitutional or statutory right in order to exercise another. Appellant could not be understood to waive his rights under the IAD simply because he exercised his right to make pre-trial motions. Haigler, 531 A.2d 1236, 1242.

The Tennessee Supreme Court has effec-

tively forced the defendant to waive his rights under the Interstate Act on Detainers by penalizing him as unable to stand trial because of the state's appeal of a unfavorable pre-trial motion ruling. Undoubtedly the defendant has the constitutional right to be tried within 120 days and the constitutional right to file pre-trial motions without being penalized. The procedure by which to allow both simultaneously is found within the compact itself- to have the trial judge make a determination in open court for a continuance for good cause shown, or make a determination in open court that the defendant was unable to stand trial. The trial judge did neither, and in consideration of the defendant's constitutional rights, dismissed the presentment against the defendant. The appellate courts, however, ignored the defendant's constitutional right to be tried within 120 days, and penalized him for filing

pre-trial motions.

The Supreme Court of Iowa in State v. Wood, 241 N.W.2d 8, 12 (1976), deferring to Nelms v. State, 562 S.W.2d 923 (Tenn. 1976), held that because of its remedial nature, the Compact is to be liberally construed in favor of the prisoners it was intended to benefit, and therefore, if a prisoner is not brought to trial within the specified time period, the charges against him must be dismissed with prejudice. The Court also held that nothing could toll the running of the time limitations except the inability of the prisoner to stand trial **as so determined by the court**. The defendant in Wood was in another jurisdiction and unable to stand trial.

The Supreme Court of Colorado in People v. Allen, 744 P.2d 73, 77 (1987), held that it is the prosecutor's burden to comply with the statute that includes a duty to keep track of the proceeding, to make the court

aware of the time limits and other requirements of the Agreement and to assure that the trial date is timely.

The Supreme Court of Appeals of West Virginia in Moore v. Whyte, 266 S.E.2d 137, 141 (1980), held that each party state to the Agreement on Detainers is presumed to know its terms and must comply with it. In Moore, as in the present case, no motion for continuance had been granted in open court with the defendant present; consequently, the indictment was dismissed.

The Court of Criminal Appeals of Oklahoma in Bell v. State, 714 P.2d 205, 206 (Okl. Cr. 1986), held that the failure to bring the prisoner to trial within 120 days of arrival in the state required dismissal of the charges with prejudice. The court held that under Art. VI the time limits can be tolled, but firmly established that the record must demonstrate the good causes for

tolling the time limitations. There is no record in this case of any cause to support the tolling of the statute because of the inability of the defendant to stand trial.

The defendant in this case has at all times invoked the protections of the Interstate Agreement on Detainers. He was brought to the State of Tennessee on December 11, 1990 with a trial date of February 11, 1991. He was incarcerated in the Knox County Jail in Knoxville, Tennessee, and ready, prepared, and willing to go to trial on February 11, 1991. Despite the defendant's objections, the State, pursuant to their oral motion, was granted a continuance, and the case continued until April 1, 1991.

On the same date, the Court granted the defendant's motion to suppress evidence. In response, the State filed an interlocutory appeal. The State, however, never filed a motion for stay or continuance. There was

never a motion for a stay or continuance set on the docket for hearing. No hearing was ever held in open court. No hearing was held in chambers. Although there was an informal discussion held in chambers, it was initiated by the State and neither the defendant, nor his attorney, was provided with advance notice. There was no court reporter present during this in-chambers discussion, and the informal discussion was brief and non-adversarial in nature. Regardless, the stay order was signed the next day without any hearing in open court and without the defendant or his counsel present.

The law in regard to the Interstate Agreement on Detainers is clear:

> 1. The defendant has a constitutionally protected right to be tried within 120 days.
>
> 2. If any party wishes to move for a continuance, the grant-

ing of said continuance must be in open court, with the defendant and counsel present, and must be granted for good cause.

3. A determination that the defendant is unable to stand trial must be made by the trial court.

To suggest, as does the Tennessee Supreme Court, that a defendant waives his rights protected by the Interstate Agreement on Detainers merely by filing motions to suppress evidence would be to render the Interstate Agreement on Detainers null and void. Pre-trial motions are filed in almost every case and must be filed pre-trial in order to preserve the Constitutional attack on the admission of certain evidence. By its holding, the Tennessee Supreme Court has usurped the Tennessee Legislature and the United States Congress by judicially eliminating, for all practical purposes the effect

and intent of the Interstate Agreement on Detainers.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

I, Douglas A. Trant, Attorney for Thomas J. Dillon, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, state that the Petition for Writ of Certiorari from the Supreme Court for the State of Tennessee was delivered to the Clerk, United States Supreme Court, by placing same in the United States Mail, with sufficient postage affixed thereto, at the United States Post Office, Knoxville, Tennessee, on February 12th, 1993, within the time permitted for the filing of a Petition for Writ of Certiorari pursuant to Rule 13 of the Rules of the Supreme Court of the United States and, that pursuant to Rule 29 of the Rules of the Supreme Court of the United States, hereby certify that on the 12th day of February, 1993, I served copies of the foregoing Application for Writ of Certiorari

to the Supreme Court of the United States on Charles Burson, Attorney General for the State of Tennessee by mailing a copy of the same in a duly addressed envelope with postage pre-paid to his respective address .

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State of Tennessee)

County of Knox)

Notary Public

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APPENDIX

IN THE CRIMINAL COURT, DIVISION II

FOR KNOX COUNTY, TENNESSEE

STATE OF TENNESSEE	)	
	)	NO. 37597
vs.	)	
	)	
THOMAS DILLON	)	
	)	
Defendant	)	

ORDER

The defendant has filed a Motion under Tennessee Code Annotated 40-31-101, Article IV (c) that the indictment be dismissed for failure of the State to cause the trial to be commenced within 120 days of the arrival of the prisoner in the receiving state. The State insists that this period was properly tolled by the Stay Order entered. The defendant counters that this Order was not entered in compliance with the Interstate Compact in that it was not entered in open Court, the

prisoner or his counsel being present.

The Court has reviewed the applicable statutes, the case law and the testimony as well as the entire file and finds as follows:

1. The Stay Order was not entered for good cause in open Court in compliance with the Interstate Compact for Detainers.

2. The Order failed to toll the running of the 120 day period.

Therefore, the indictment is DISMISSED with prejudice and the defendant ordered returned to Federal custody.

The Clerk will forward copies of this Order to the defendant, the attorney for the defendant, the District Attorney General and the State Attorney General and Reporter.

Enter this 17th day of May, 1991.

_____

RAY L. JENKINS, JUDGE
SIXTH JUDICIAL CIRCUIT
DIVISION II

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE, TENNESSEE

STATE OF TENNESSEE, Appellant	) C.C.A. NO. 03C01-9103-CR-00091
v.	) KNOX COUNTY
THOMAS DILLON, Appellee	) HON. RAY L. JENKINS, JUDGE) (Rule 3 Appeal and Rule 9 Appeal)

For the Appellee:
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OPINION FILED: October 10, 1991

JUDGMENT DISMISSING INDICTMENT REVERSED, INDICTMENT RE-INSTATED, AND CASE REMANDED

ORDER SUPPRESSING EVIDENCE REVERSED AND CASE REMANDED TO THE TRIAL COURT

John K. Byers
Presiding Judge

O P I N I O N

This case arises as a result of the death of Richard Keith Nolley, from gunshot wounds, for which the defendant, Thomas Dillon, is charged with murder.

The case came to us initially by way of an interlocutory appeal under Rule 9, T.R.A.P., by the state, seeking to reverse the ruling of the trial court which suppressed evidence essential to the state's prosecution of Dillon on its charge of mur-

dering Richard Keith Nolley. Subsequently, the trial court dismissed the charges against Dillon, who was brought to Tennessee from Federal custody to be prosecuted on a charge of murdering Richard Keith Nolley, on a finding the state had failed to try him within the time limitation required by the Interstate Detainer Act (I.D.A.). T.C.A. §40-31-101.

Specifically, the act requires, in article IV, section (c), as follows:

> In respect of any proceedings made possible by this article, trial shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Dillon was delivered to Tennessee on December 11, 1990. On January 22, 1991, Dillon's counsel filed a motion to suppress evidence seized pursuant to a search warrant. The case was set for trial on February 11, 1991. On that date, the trial court granted Dillon's motion to suppress. The case was continued until April 1, 1991.

On March 5, 1991, the trial court granted an interlocutory appeal under Rule 9, T.R.A.P., to contest the suppression order, in which the court found the state could not proceed against Dillon without the evidence which was suppressed.

On March 6, 1991, an order was entered which recited the "matter came on to be heard on the motion of the State of Tennessee." The order recited the previous history of the case including the suppression of the evidence by the trial court and the grant of an interlocutory appeal to test the action. The

trial court stayed the running of time for prosecution under the Interstate Detainer Act. On April 4, 1991, this Court approved the application and granted the state's interlocutory appeal.

On April 22, 1991, Dillon moved to dismiss the indictment for failure of the state to bring him to trial within one hundred twenty (120) days of the date he was transferred to Tennessee. On May 17, 1991, the trial judge granted the motion, dismissed the indictment, and ordered that Dillon be returned to Federal custody.

On May 20, 1991, the state filed a notice of appeal from the order dismissing the indictment. On that same date, this Court stayed the return of Dillon to Federal custody pending the resolution of the state's direct appeal on the question of dismissal of the indictment. Rule 3, T.R.A.P. The case is now ready for determination in this Court

on both the Rule 3 and Rule 9 appeals.

DISMISSAL OF THE INDICTMENT

The question of whether the trial judge correctly dismissed the indictment for failure of the state to bring the defendant to trial within one hundred twenty (120) days turns on whether the proceeding in the judge's chambers on March 5, 1991, was a continuance granted in open court as contemplated by the Interstate Detainer Act and whether the granting of the defendant's motion to suppress evidence tolled the running of the one hundred twenty (120) days in which to bring the defendant to trial.

The stay of the time limitation which was entered on March 6, 1991, was the subject of a hearing on a motion by the state to supplement the record. The hearing took place on August 23, 1991, and the trial judge entered an order and finding of facts.

We glean from the supplemental record

that on March 5, 1991, the state initiated a proceeding in the trial judge's chambers without filing a written motion. The trial judge, counsel for the defendant and two assistant district attorneys general were present. At the conclusion of the hearing, the trial court stayed the running of the one hundred twenty (120) days because of interlocutory appeal granted to the state to test the correctness of the judge's ruling in which evidence was suppressed on the motion of the defendant.

The defendant contends this in-chambers proceeding did not conform to the requirement that the continuance be granted in open court. He relies primarily upon the case of Stroble v. Anderson, 587 F.2d 830 (6th Cir. 1978), in which the Court held that "open court," within the meaning of the Interstate Detainer Act, meant with a judge on the bench. In Stroble, the record shows the

continuance was obtained by an informal practice in the trial court in which continuances were granted by the clerk, and then signed by the judge, ex parte, and without notice. Obviously, neither the defendant nor his counsel was present when the continuance was granted, nor was any good cause therefor shown in the record.

In United States v. Odom 674 F.2d 228 (4th Cir. 1982), the trial of Odom was continued by the judge, in chambers, with Odom's counsel present. The Court held that a proceeding in chambers with the defendant's counsel present satisfied the requirement of the Interstate Detainer Act and a continuance granted in such circumstances for good cause shown was proper.

As the Odom court pointed out and our reading of Stroble confirms, there was no reason for the court in Stroble to decided the open-court issue because of the factual

background.

The case before us is sufficiently close to the facts in Odom, i.e., counsel for the defendant being present and good cause shown for a continuance, to lead us to the conclusion that the order staying the running of the 120-day time limit entered by the trial judge satisfies the requirement of Article IV(3) of the Interstate Detainer Act.[1] and [2]

We conclude therefore the trial judge erroneously dismissed the indictment in this case. Accordingly, the order dismissing the indictment is vacated, the indictment is reinstated and the case is remanded to the trial court for further proceedings.

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[1] As a precaution we would say trial courts should be ever mindful of the implications of informal in-chambers proceedings in cases involving I.D.A. cases and should consider conducting any hearing on motions in open court with the appropriate principals present.

[2] Both the state and the defendant have cited numerous cases on this issue. We conclude the two cases cited by us are controlling and do not deem it necessary to discuss the others.

SEARCH WARRANT

The trial judge suppressed evidence seized as a result of the search of a safe deposit box in Sarasota, Florida. The box contained a .22 caliber pistol with silencer and clip and several credit cards and other cards which were issued in the name of the deceased.

The defendant attacks the search warrant on various grounds in this Court. However, the trial court's ruling was based only upon a finding that the affidavit did not show sufficient probable cause to believe the gun would be found in the safety deposit box.

The search warrant was issued by a federal magistrate upon the affidavit of an agent of the F.B.I. and was issued as a result of a federal investigation.

The state insists federal law controls our review of the search warrant. The defendant insists the law of Tennessee is controlling.

Although we find no Tennessee case on point on this issue, we believe the better view is as expressed in People v Saiken, 49 Ill.2d 504, 275 N.E.2d 381 (1971), and Burge v. State, 443 S.W.2d 720 (Tex. Crim. App. 1969), that the law of the forum state would apply, that is, the search and seizure must comply with our state constitution.

We therefore adopt the view that the Tennessee law shall apply in testing the sufficiency of this warrant.

The affidavit filed in application for the search warrant before the federal magistrate contained many averments, which were developed during a long investigation of the defendant. Those averments which we conclude are pertinent to the evidence suppressed by the trial judge are as follows:

> 1. March 1986
> Dillon was at a confidential informant's house in Marion, Illinois, and displayed a .22

caliber handgun, fitted with a silencer. Dillon and the confidential informant test fired the silenced handgun into the crawl space of the house.

2. Date ?
An Air Sunshine ticket for Fort Lauderdale, Florida, to Sarasota, Florida, was bought with Nolley's VISA card for a June 13, 1987 flight at 7:30 p.m.

3. June 13, 1987
Nolley and Dillon were together on a commercial flight from Fort Lauderdale to Sarasota, Florida.

4. June 14, 1987
Nolley and another person checked into a Knoxville motel in the evening.

5. June 15, 1987
Nolley is found shot to death at motel. Nolley was shot with .22 caliber weapon. Spent cartridge casings found in the area.

6. Date ?
Nolley's son said his father

knew a Tom Dillon in Florida.

7. Date ?
Nolley's address book referred to a "TJD" with a telephone number which was subscribed to 5922 30th Avenue West, Apartment 5922, Bradenton, Florida.

8. June , 1987
The telephone number in Nolley's address book and the apartment in Bradenton are found to be in the name of David A. Schrimel.

9. Date ?
Stacy Byron, the Bradenton landlady, knew Dillon by the name of Schrimel.

10. June 19, 1987
Dillon rented a safety deposit box at First National Security Center, 640 S. Washington Boulevard, Sarasota, Florida.

11. June 29, 1987
F.B.I.agents tell Agt. Broome that a federal arrest warrant was issued in 1985 in Ohio for Thomas Dillon for a drug offense.

Dillon is arrested at 30th Avenue West, Apartment 5922, Bradenton, Florida, and admits he is Thomas Jerome Dillon. He discloses one handgun to the agents.

Dillon says he does not want agents in his house and refuses consent to search, although admitting he has other guns in the apartment.

A search of the apartment, pursuant to a warrant, disclosed 2 handguns (not .22 caliber). A key envelope from the First National Security Center, Sarasota, Florida, was observed during the search.

12. July 7, 1987
Four spent .22 caliber cartridge casings are recovered from the crawl space of the confidential informant's house in Marion, Illinois.

13. September 14, 1987
Agent Jerry Wilkes, an expert in firearms comparison, tells Agent Tarbox that an analysis of the spent casings recov-

ered from the Marion crawl space and from the Knoxville murder scene shows they were fired from the same gun.

14. September 22, 1987
Dillon's safety deposit box had not been opened since he rented it on June 19. Only the renter would be able to open the box after he was compared with his photograph on file with the security company. The box was large enough to contain handguns.

15. October 1, 1987
Search warrant is obtained for safety deposit box.

The trial judge held there was no probable cause for the F.B.I. agent to believe the gun was in the lock box which was searched. We think the trial judge overlooked some compelling averments in the affidavit.

The affidavit shows the gun was in the possession of the defendant in 1986. On June 15, 1987, Nolley was shot to death and bal-

listics on shell casings showed the gun Dillon possessed in 1986 was fired in the motel room where Nolley was killed, on June the 14th or 15th, 1987.

On June 13, 1987, Nolley and Dillon were seen together in Florida. On June 14, 1987, Nolley and another person checked into the motel where Nolley was killed.

On June 29, 1987, F.B.I. agents searched Dillon's house. They did not find the .22 caliber pistol. However, an envelope for a key to a commercial lock box was observed. After further investigation concerning the lock box, it was searched and the gun and other incriminating evidence concerning the murder of Nolley was found.

The trial judge was concerned about the gap of time between March 1986 when Dillon was known to have had this gun and the murder of Nolley on June 15, 1987. The trial judge apparently found it unreasonable to assume

Dillon would retain the weapon for fifteen months. The averments in the affidavit, however, strongly indicate Dillon did in fact retain this gun.

The connection of Dillon with Nolley near the time of the murder as shown, and the connection of the shell casings with the gun Dillon had in March 1986, requires no unsupported assumptions. Indeed, it compels a person of reasonable caution to conclude Dillon still retained the gun.

As to whether the gun might reasonably be thought to be located in Dillon's house, it is generally held that it is reasonable to conclude that a gun will be kept at a person's residence. See LaFave 2d, Search and Seizure, §3.7(a), pp. 82 et. seq. (2d ed. 1987), and cases therein cited.

The trial judge, in deciding there was no nexus between the averments in the affidavit and the lock box, concluded the agent had

played a "hunch." We do not agree with the conclusion.

After observing the envelope containing the name of a commercial safety deposit box company, the officers, upon further investigation, as averred in the indictment, found that Dillon had, on June 19, 1987, rented a lock box. This was four days after the murder of Nolley. The agent made contact with the safety deposit box company on September 22, 1987, and confirmed Dillon had rented the lock box on June 19, 1987, and had not returned to open it since that time.

Based upon this, we are of the view that a reasonable, cautious person could reach the conclusion the gun was probable in the lock box. This is all that is required for a showing of probably cause to search the premises for things targeted in a search warrant. See State v. Jacumin, 778 S.W.2d 430, 437 (Tenn. 1989), and cases therein

discussed.

We, therefore, find the trial judge erroneously suppressed the evidence in this case, and we reverse the order thereon and remand the case to the trial court for further proceedings.

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John K.Byers, Presiding Judge

CONCUR:

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Gary R. Wade, Judge

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Joseph M. Tipton, Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

THOMAS DILLON,	)	FOR PUBLICATION
	)	
Defendant-Appellant,	)	Filed
	)	November 16, 1992
	)	
v.	)	KNOX CRIMINAL
	)	
STATE OF TENNESSEE,	)	C.C.A. No.
	)	03C01-9103-CR-0091
Appellee.	)	Hon. Ray L.
	)	Jenkins, Judge

For Defendant-Appellant:	For Appellee:
Douglas A. Trant Knoxville, TN	Charles W. Burson Attorney General & Reporter
	Rebecca L. Gundt Asst. Atty. Gen. Nashville, TN

O P I N I O N

COURT OF CRIMINAL APPEALS MODIFIED
IN PART, AFFIRMED IN PART AND REMANDED.

DROWOTA, J.

This case involves a "speedy trial" provision of the Interstate Compact on Detainers, T.C.A. §§ 40-31-101 to 108 (1990). Specifically, we must decide whether the statutes' 120-day period for bringing a prisoner to trial was tolled by (1) the State's having obtained a continuance, or (2) the Defendant's inability to stand trial.

In June, 1989, a Knox County Grand Jury returned a presentment charging Defendant Thomas Dillon with the first degree and felony murder of Keith Nolley in a Knoxville motel room. At the time of presentment, Defendant was in federal custody serving a sentence on other charges. On December 11, 1990, Defendant was brought from the federal

correctional institute in Jessup, Georgia to stand trial on the Knox County murder charges. This transfer was effected pursuant to a request for temporary custody under the Interstate Compact on Detainers (the "Compact"). See T.C.A. § 40-31-101, art. IV (1990).

On December 14, 1990, Defendant was arraigned in Knox County Criminal Court and his trial set for February 11, 1991. On February 8, 1991, a hearing was held on Defendant's motion to suppress evidence allegedly seized in violation of his federal and state constitutional rights. On February 11, 1991, the original trial date, the trial court granted Defendant's motion to suppress and, upon the State's motion, reset the trial for April 1, 1991. On March 5, 1991, the trial court granted the State an interlocutory appeal on the suppression issue.

Also, on March 5, 1991, an in-chambers

discussion took place between the judge, the prosecutors, and counsel for Defendant. While the parties' accounts of this discussion differ, two facts are undisputed: First, counsel for Defendant was not given prior notice of the meeting; second, a verbatim record of the proceeding was not preserved, by court reporter or otherwise.

The following day, March 6, the trial court entered an order purporting to suspend the speedy trial provision of the Compact and continuing the case pending an appellate determination of the suppression issue.

On April 22, 1991, 130 days after Defendant was brought to Tennessee, Defendant moved to dismiss the presentment of the State's failure to commence trial within 120 days. On May 17, 1991, after a hearing, the trial court entered an order stating (1) the State failed to commence trial within 120 days of the Defendant's arrival in Tennessee,

(2) the court's March 6 order, purporting to suspend the 120-day provision, was not entered in compliance with the Compact, and that therefore (3) the presentment must be dismissed with prejudice and the Defendant returned to federal custody.

On May 20, 1991, the State appealed the dismissal and the Court of Criminal Appeals stayed Defendant's return to federal custody. On October 10, 1991, having consolidated the State's Rule 9 interlocutory appeal of the suppression order and Rule 3 appeal of the dismissal, the Court of Criminal Appeals reinstated the presentment, reversed the suppression order, and remanded the case for trial.

I.

Resolution of this appeal requires us to interpret several provisions of the Interstate Compact on Detainers, as enacted in

Tennessee by T.C.A. §§ 40-31-101 to 108 (1990). This Compact has been adopted by the federal government, the District of Columbia, and 48 states. See 18 U.S.C.A. app., Interstate Agreement on Detainers, § 1, Historical Note (1985) (Mississippi and Louisiana do not participate).

The Compact establishes uniform procedures whereby a state may resolve its charges against another jurisdiction's prisoner. Because detainers adversely affect programs of prisoner treatment and rehabilitation, see generally Note, The Interstate Agreement on Detainers: Defining the Federal Role 31 Vand. L. Rev. 1017, 1019-20 (1978), the Compact's purpose is to provide cooperative state procedures for the expeditious and orderly disposition of the charges underlying such detainers. See T.C.A. § 40-31-101, art. I. To this end, the Compact provides that when a prisoner is called to answer charges

in another jurisdiction,

> trial shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Id. at art. IV (c).[1] If a prisoner is not brought to trial within the specified time period, the charges against him must be dismissed with prejudice. See id. at art. V(c). Because of its remedial nature, the Compact is to be liberally construed in favor of the prisoners it was intended to benefit. See Nelms v. State, 532 S.W.2d 923, 927 (Tenn.

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[1] The Compact also contains a provision whereby a prisoner against whom a detainer has been lodged may demand trial within 180 days. See T.C.A. § 40-31-101, art. III(a) (1990); State v. Moore, 774 S.W.2d 590, 593 (Tenn. 1989) (180 days runs from date State receives notice of prisoner's request for prompt disposition).

1976).

The Compact provides for tolling of the 120-day period in two situations. First, the period is tolled by "any necessary or reasonable continuance" granted "for good cause shown in open court." See T.C.A. § 40-31-101, art. IV(c). Second, "running of [the Compact's speedy trial] periods shall be tolled whenever and for as long as the prisoner is unable to stand trial." Id. at art. VI(a). Because Defendant was not tried within 120 days after being brought to Tennessee, we must determine whether either of these tolling is applicable.

II.

The Compact provides that "for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." T.C.A. § 40-31-101, art. IV(c).

The parties agree that, on March 5, 1991, counsel for Defendant was approached in a courthouse hallway by the State prosecutors and asked to step into the trial judge's chambers. There then ensued a discussion respecting the State's request to continue Defendant's case during appellate review of the trial court's suppression order. The State urges that the continuance issued the following day was granted in accordance with the statutory requirement that "good cause [be] shown in open court." We disagree.

In order to effectively toll the 120-day period, the statute requires that the prisoner or his counsel be present during a judicial determination as to whether good cause has been shown for granting a continuance. Id. A continuance granted ex parte has no tolling effect. Defendants are thus given the right to appear and contest the State's assertion of good cause.

Here, the State filed no motion or otherwise apprised Defendant of its intention to seek a continuance. Instead, defense counsel was stopped in a hallway and asked to attend an impromptu discussion in chambers. Appearing thus without notice, Defendant has no opportunity to prepare a response to the State's request. We decline to adopt an interpretation of the Compact that renders Defendant's right to appear a mere formality. Because Defendant was denied the opportunity to prepare a reasoned response, the resulting continuance was not issued in accordance with the statutory requirements and thus had no tolling effect.

We note also the failure of the statutory requirement that the continuance be granted in "open court." "Open court" requires, at a minimum, that a verbatim record be made of the proceedings[2] See T.C.A. § 40-14-307(a) (1990). The State has an affirma-

tive duty to abide by the statutory requirements and made a record on the question whether a continuance has been granted for good cause. See Johnson v. Stagner, 781 F.2d 758, 763 (9th Cir. 1986). Although we decide to present issue based on lack of notice to Defendant, because there is no transcript of the in-chambers discussion, we would in any event be unable to properly exercise our appellate duty to review whether the State met its burden of showing good cause for a continuance.

III.

The Compact also provides that its speedy trial provisions "shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the

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[2] We decline to hold, as Defendant urges, that "open court" invariably requires a "judge on the bench," see Stroble v. Anderson, 587 F.2d 830, 839 (6th Cir. 1978), and can never be satisfied by an in-chambers, record hearing.

court having jurisdiction of the matter." T.C.A. § 40-31-101, art. VI(a) (emphasis added). In State v. Moore, 774 S.W.2d 590, 597 (Tenn. 1989), we recognized that the prisoner is "unable to stand trial" if he is absent from the jurisdiction. See also Fuente v. State, 549 So.2d 652, 656 (Fla. 1989) (citing cases). Further, we agree that a prisoner is unable to stand trial while physically or mentally disabled. See Stroble v. Anderson, 587 F.2d 830, 838 (6th Cir. 1978).

Moreover, a number of courts have held that a prisoner is unable to stand trial during "periods of delay occasioned by the defendant." See, e.g., United States v. Nesbitt, 852 F.2d 1502, 1516 (7th Cir. 1988); United States v. Roy, 771 F.2d 54, 59 (2d Cir. 1985); State v. Burnson, 106 Or. App. 252, 255-56, 807 P.2d 309, 310-11 (1991). These cases have gone on to interpret "peri-

ods of delay occasioned by the defendant" to include time consumed by consideration of defendant's pretrial motions. see Nesbitt, 852 F.2d at 1516, as well as time taken by resolution of good-faith appeals from successful defense motions. See Roy, 771 F.2d at 59; Bernson, 106 Or. App. at 255-56, 807 P.2d at 310-11.

We find the interpretation placed on the phrase "unable to stand trial" by courts such as Roy and Bernson persuasive. In Bernson, the Court reasoned:

> Failure to toll the time during the state's good faith appeal of a trial court's decision on a pretrial motion renders a normally appealable order final for all practical purposes . . . . [therefore] denying the prosecution its right to appeal what are often pivotal pretrial issues.

Bernson, 106 Or. App. at 255, 807 P.2d at 310. Similarly, the Roy Court explained that

since the prosecution's nonfrivolous appeal was taken in good faith and without attempt to delay the trial, the time needed to resolve the appeal was properly chargeable to the defendant as time "the prisoner is unable to stand trial." See Roy, 771 R.2d at 59 (quoting with approval United States v. Roy, 597 F. Supp. 1210, 1217, (D. Conn. 1984)). "The time from the filing of [defendant's] motion to suppress until the conclusion of the appellate process directly attributable to that motion" is time the defendant is unable to stand trial. Roy, 771 F.2d at 59. Because we agree with the reasoning expressed in cases such as Roy and Bernson, we hold that the applicable 120-day period was tolled as of January 22, 1991, the date the Defendant filed his motion to suppress.

IV.

The final issue in this case concerns

the sufficiency of a search warrant issued by a federal magistrate in Florida. The search warrant was based upon the affidavit of a federal law enforcement official given as a result of a lengthy federal investigation. The trial judge suppressed the evidence obtained under the warrant seized from a safety deposit box belonging to the Defendant in Sarasota, Florida. The box contained a .22 caliber pistol with silencer and clip allegedly owned by the Defendant and used in the murder committed in Knoxville for which he was ultimately charged. The trial court's ruling was based upon a find that the affidavit lacked sufficient probable cause connecting the weapon to the safety deposit box.

The State insists that federal law controls our review of the search warrant. The Court of Criminal Appeals, applying Tennessee law as urged by the defense, held that the affidavit contained sufficient information

for a reasonable person to conclude that the weapon might be in the lock box.

In State v. Mollica, 554 A.2d 1315 (N.J. 1989), federal law enforcement officials obtained evidence in a manner consistent with federal law, but had the evidence been obtained in the same manner by state law enforcement personnel, it would have violated state law. The question thus presented in Mollica was whether the evidence seized should have been suppressed in the state courts after federal agents turned the evidence over to the state officials.

The New Jersey Supreme Court in Mollica first noted that "[b]ecause federal officers necessarily act in the various states, but in the exercise of federal jurisdictional power, pursuant to federal authority and in accordance with federal standards, state courts treat such officers as officers from another jurisdiction." Mollica, 554

A.2d at 1327. See also State v. Bradley, 719 P.2d 546 (Wash. 1986); State v. Dreibelbis, 511 A.2d 307 (Vt. 1986); Morales v. State, 407 So.2d 321 (Fla. App. 1981). Accordingly, the court went on to hold that when evidence is seized "by federal officers acting independently of state authorities and in conformity with federal law, state constitutional [protection against unreasonable searches and seizures] does not bar subsequent prosecutorial use of [the seized evidence] for such purposes as establishing probable cause for the issuance of search warrants." Mollica, 554 A.2d. Put another way, state law does not govern the federal officers with respect to evidence they seize, provided they acted pursuant to federal authority and consistent with federal law, and provided further they acted independently of state officials. Id. at 1330. The New Jersey Supreme Court reasoned that

in determining the validity of a search and seizure conducted by officers of another jurisdiction, the critical assumption that obviates the application of the state constitutional goals will not thereby be compromised. In our jurisdiction, we recognize that an essential objective of our constitutional prohibition against unreasonable search and seizure and the remedial exclusionary rule is to deter unlawful police conduct. These constitutional protections may also implicate concerns of judicial integrity. Further, the exclusionary rule serves to vindicate the impairment of an individual's state constitutional right to be free from unreasonable search and seizure.

None of these constitutional values, however, is genuinely threatened by the search and seizure of evidence, conducted by officers of another jurisdiction under the authority and in confor-

> mity with the law of their own jurisdiction, that is totally independent of our own government officers. Thus, in that context, no purpose of deterrence relating to the conduct of state officials is frustrated, because it is only the conduct of another jurisdiction's officials that is involved. Judicial integrity is not imperiled because there has been no misuse or perversion of judicial process. Further, no citizen's individual constitutional rights fail of vindication because no state official or person acting under color of state law has violated the state constitution.

Mollica, 554 A.2d at 1328 (citations omit-

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3 In making this determination, "[d]iffering relationships and interactions may suffice to establish agency. Thus, antecedent mutual planning, joint operations, cooperative investigations, or mutual assistance between federal and state officers may sufficiently establish agency and serve to bring the conduct of the federal agents under the color of state law. On the other hand, mere contact, awareness of ongoing investigations, or the exchange of information may not transmute the relationship into one of agency." Mollica, 554 A.2d at 1329.

ted). It should be emphasized that in order for the rule to apply, the federal officer must not have acted as an agent of the state at the time he acquired the evidence. Id. at 1329-30.[3] See also LaFave 2d, Search and Seizure, § 1.5(c) (Supp. 1992) (embracing Mollica analysis).

The search in the present case was conducted in Florida by federal officials pursuant to a search warrant issued by a federal judge as a result of an extensive federal investigation into the criminal activities of the Defendant. In view of these facts, the Mollica reasoning applies and we approve of the approach taken by the New Jersey Supreme Court in that case insofar as it relates to the facts presented here.[4] Accordingly, we

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[4] We will wait for an appropriate case before addressing the analysis to be followed when, for example, federal authorities conduct the search in Tennessee.

hold that it was error for the trial court, like the Court of Criminal Appeals, to analyze the sufficiency of the search warrant under the somewhat stricter standards of Tennessee law. See generally, State v. Jacumin, 778 S.W.2d 430 (Tenn. 1989).

In view of the foregoing, the judgement of the Court of Criminal Appeals is modified in part and affirmed in part. The case is remanded to the trial court for further proceedings consistent with this opinion, specifically for an examination of the sufficiency of the search warrant in view of our adoption of the rule announced in Mollica, supra. Costs shall be taxed against the Defendant.

FRANK J. DROWOTA, III
JUSTICE

Concur:

Reid, C.J.
O'Brien, Daughtrey and Anderson, JJ.